In addition to setting out in Appendix A pre-existing sections using this language, we also compare pre-existing sections using language similar to item 1 of the definition of "related person".

Some of the Characteristics of the Industry to Which Section 9 Applies in Respect to Merchandising and Pricing Practices.

The Legislature was not legislating in the abstract when it enacted § 9. It was enacting a regulatory provision to apply to a particular Industry, with, it is to be presumed, an awareness of the distribution and pricing practices of the Industry.

Similarly, appellants' arguments here are not to be considered in the abstract, but in the light of the merchandising and pricing practices of the Industry.

The Industry does not publicize or announce its merchandising and pricing practices. They are, however, matter of common knowledge among those practically acquainted with the Industry. It is, as has been said, to be presumed that the New York State Legislature was aware of the situation when it enacted § 9. The Industry had been the subject, for several years, of study; of a great deal of discussion publicly, in and out of legislative precincts; and, we may be certain, with members of the Legislature. The Legislature could act on its common knowledge, on its pooled general knowledge (*United States* v. *Carolene Products Co.*, 304 U. S. 144, 152-3).

The Legislature was seeking to achieve lower prices of liquor to consumers in New York, which prices had been found after study to be higher in New York than in many places outside New York. These prices had been state-protected and enforced under § 101-c of the Alcoholic Bever-

age Control Law. The Moreland Commission had found that wholesaler to retailer prices were higher in many instances in New York than retailer to consumer prices elsewhere (*supra*, pp. 17-18). It is to be presumed that the Legislature and its members learned of the operations of the Industry, as to the manner in which wholesale prices are determined, and generally as to the manner in which brand owners market their brands through wholesalers (*cf. Martin* v. *State Liquor Authority,* 15 N. Y. 2d 707 [1965], aff'g Opinion of Cooke, J., 43 N. Y. Misc. 2d 682, 685). It is to be presumed that on this knowledge the Legislature dealt as it did with distiller and wholesaler prices when it also repealed the statutory minimum consumer price provision.

In addition, the merchandising and pricing practices in the Industry can be deduced from distribution patterns and from wholesaler to retailer prices in this State and elsewhere (*infra*). Occasionally something on the subject appears in testimony in litigations. Much is revealed by statements in the very affidavits in this case. And there have been some published objective studies of the industry. The latter all attest to the hold of the manufacturer on the merchandising and pricing of their brands from the time they leave the distiller until they reach the consumer.

The known characteristics of the Industry in respect to merchandising and pricing make clear the reason for and purpose of § 9. They also demonstrate the disingenuousness of appellants' contentions (*e.g.,* Br. pp. 62-63) of problems and of the legal propriety of obtaining information for the purpose of compliance (Br. pp. 28, 45-46).

Appreciation of the merchandising and pricing practices in the industry makes clear indeed that it is not this statute which is incompatible, as appellants argue (Br., Point II),

with anti-monopoly and price anti-discrimination acts but, if anything, current industry practices.[9]

Objective studies have concluded that because of the high degree of concentration in the industry, the "areas in which the autonomous decisions of the wholesaler, retailer or small distiller are significant are correspondingly narrow, * * *. The economist would say that we are dealing with an oligopolistic[10] industry, whose product is a monopolistically differentiated one, and whose pattern of price fixing [was] legally sanctioned" (*The Distiller Spirits Industry: A Marketing Survey,* Borregard & Glusker, Yale Law School [1950] pp. 15-16).

The distilling of whiskey in the United States is in the hands of at most 88 companies (Moreland Commission Study Paper #5, p. 7), which have gross annual sales of nearly $5 billion. Four of the distillers known in the industry as the "big four" do some 60% of the business of distilling or manufacture and set its pace. These four are among the appellants in this action. Three of the affidavits on behalf of the appellants are made by vice-presidents of three of the "big four" (Lind, Revit, Hermann).

The industry is characterized by its brand consciousness. Each distiller has a number of brands (see, *e.g.,* Affidavits

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[9] In the current session of the Legislature, hearings are being conducted by a joint legislative committee (Senator Seymour R. Thaler, Chairman) in an endeavor to find the answer to the continued high prices of alcoholic beverages in New York State since the 1964 liquor law became effective. The minutes of hearings already held are not yet available. As reported in the press the pricing practices of the industry starting with the distillers and down the line as described above and *infra,* pp. 54-57, are supported and documented by testimony that is being given at these hearings.

[10] An "oligopoly" is defined by economists as an industry in which a few sellers are dominant (*id.* p. 147).

of Lind, Street, and Hermann, listing brands of Seagram, Hiram Walker and National Distillers). Each brand is in a price class—(AA Prime, AA, A Prime, A, B, C). Each distiller—certainly the big four distillers—has a brand or brands within each class. (Moreland Commission Study Paper #5, p. 11.)

The brand class of a distiller's product, the retention of its prestige, is the supervening concern of the distiller. Brands are developed with the purpose of fitting into a certain class. The class is equated with the consumer price per bottle. The selling prices from distillery through wholesaler to retailer are arrived at on a mark-up scale for the brand intended as a "prime" or other class brand.

The industry considers its competitive weapon to be not price, but brand building and creating brand demand by brand advertising. The competition is not between distillers as such but between equivalent brand classes (*Industrial Pricing and Market Practices,* Alfred R. Oxenfeldt, "Whiskey Prices", p. 476; *The Whiskey Industry,* Harold L. Wattel[11] [1953 New School for Social Research doctoral thesis] Vol. II, p. 353).

From this concern in maintaining the prestige of its brands in its various brand classes the following truth concerning the industry has come about:

The distiller holds a firm grip on wholesaler to retailer prices. It does so through its methods of merchandising in the States where there are wholesalers, *i.e.,* the "open" or "license" States.[12] Distillers sell in these States through

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[11] Author of Study Paper No. 5 for the Moreland Commission, cited *supra.*

[12] The Monopoly States are considered in the next topic of this brief.

a limited number of wholesalers. The largest national distillers, such as Seagrams, have but 330 wholesalers (Lind Affidavit, R. p. 193); National Distillers have 230 (Hermann Affidavit, R. p. 225); Hiram Walker has 105 (Revit Affidavit, R. p. 205). In a State with as large a volume of liquor sales as New York (12% of the nation's total [Br., p. 14]), Brown Forman sells to but 9 wholesalers (Street Affidavit, R. p. 217).

The distillers know precisely the percentage of business each of their wholesalers does in their product (Lind Affidavit for Plaintiffs, R. pp. 193-4, itemizing the percentage of business in Seagram's brands done by each of its 330 wholesalers).[13]

Distillers usually restrict their wholesalers in that they may not sell other distillers' brands in the same price class. (*Industrial Pricing and Market Practices,* Alfred R. Oxenfeldt, "Whiskey Prices", p. 477; *The Distilled Spirits Industry: A Marketing Survey,* Borregard & Glusker, Yale Law School [1950], pp. 88, 91.) With exceptions, wholesalers will do the substantial part of their business in a particular brand or in the brands of one distiller, either by virtue of an exclusive franchise, by contract so specifying, or by the fact of having the distributorship in an area (see as to New York, *infra,* Point II, B).

Thus the merchandising practices and pricing by its wholesalers are guided by the distiller (Borregard & Glus-

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[13] The affidavit recites (pp. 193-4):

16 of their wholesalers do 75% or more of their business in Seagram brands.

61 of their wholesalers do approximately 60-75% of their business in Seagram brands.

73 do 40-60% of their business in Seagram brands.

79 do 20-40% of their business in Seagram brands.

64 do 5-20% of their business in Seagram brands.

37 do 1-5% of their business in Seagram brands.

ker, *The Distilled Spirits Industry, supra,* pp. 92-93, 96, 99, 133-134; Oxenfeldt, *Industrial Pricing and Market Practices,* "Whiskey Prices", pp. 477, 483; Wattel, *The Whiskey Industry,* Vol. II, pp. 388, 434). Indeed, wholesale prices have, bluntly, been said to be "dictated" by the distiller (Borregard & Glusker, *The Distilled Spirits Industry,* p. 87), who sets the price structure at all levels of the industry (Wattel, *The Whiskey Industry,* Vol. II, p. 388).

The wholesaler's continuing in business depends on his having the brand products to sell. Departure from distiller "suggested" prices, from the mark-up spelled out to it by the distiller, means loss of the franchise or of the distribution of the distiller's brand or brands. Loss of one distiller's brand or brands for cause makes it unlikely that the wholesaler would get the distributorship of another major distillery. Distillers may be competitors, but the maverick wholesaler as to one distiller would be suspect by the others (Studies, *supra*).

The liquor wholesaler may be independent as a business entity (which appellants assert, Br. pp. 13-14, 62). But independent of the distiller whose brand is the mainstay of its business, it is not. Neither as to pricing nor as to merchandising practices.

While the wholesaler is therefore not independent on pricing, his consolation is large volume sales, because the number of wholesalers for a brand is few and the proportion of retailers to wholesalers is large.

As to control over merchandising practices, the distillers' is impressive. Structurally the big four distillers which set the pattern for the operations of the others, the distillers which operate nationwide and therefore would

have operations in other States to consider in making affirmations under § 9, are highly organized (Lind Deposition in *Laird* v. *Gage* [Kansas District Court, 1964[14]]): They have within themselves a federation, so to speak, of geographic regions: Eastern, Southern, Western, etc. Each is under the responsibility of a company vice president. Each region is then constituted of divisions which include several States. A company officer is in charge of each division. Each State in which the company operates is under the supervision of a company executive, and so on. They have field supervisors and representatives. The reporting is from the lowest unit at the bottom on up through State directors, division directors, regional directors, to the top (*e.g.* Hermann Affidavit, R. p. 226).

The companies necessarily have massive marketing staffs which fan across the country wherever their brands are sold. They have field representatives, known colloquially in the industry as "missionaries", who watch over the merchandising of their brands and their prices. (Lind Deposition in *Laird* v. *Gage, supra;* Oxenfeldt, *Industrial Pricing and Market Practices,* "Whiskey Prices", p. 477; Borregard & Glusker, *The Distilled Spirits Industry: A Marketing Survey,* P. 75.)

We have seen from Mr. Lind's affidavit that each and every one of Seagram's wholesalers was willing to disclose —if Seagram did not already know—precisely how much of the wholesaler's total business was in Seagram products. (That is, the total of the wholesaler's business, including that which he did in the products of other distillers.) When a distiller has been able to obtain this infor-

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[14] This is the case involving the validity of a Kansas statute having the same purpose as the New York statute here involved, but totally different in provision, which was held unconstitutional (Br., p. 49. It is presently on appeal to the Supreme Court of Kansas).

mation even from wholesalers who do only 1%-5% of their business in the distiller's brand (*supra*, p. 28), would one not be obliged to eye quizzically and with considerable skepticism appellants' argument (Br. pp. 62-63) that even related wholesalers will not tell the brand owner what they charge for the brand owner's *own* product?

Sale of Distilled Spirits to "Monopoly" or "Control" States.

In addition to the sale of liquor by wholesalers in States commonly termed "open" or "license" States to whom distillers sell their brands, which has been discussed above, liquor is also sold in the United States by the States themselves. Such States are referred to as "monopoly" or "control" States.

There are 17 such States where liquor is sold by the State and not by private enterprise. In 16 of these it is sold by the State at wholesale and retail level for off-premises consumption; in the 17th (Wyoming) on the wholesale level only. In all 17 States thus the distiller sells to the State directly without intervening wholesaler.

In selling to all of these States the distiller must warrant that the distiller's price to the control State is no higher than the lowest price in any other State at the instant of sale (see Street Affidavit on behalf of Plaintiffs, R. p. 220). In at least some of these States, *e.g.*, Pennsylvania, such charge must reflect the cash or commodity allowances, post-offs or discounts offered purchasers in any other State (Phillips' Affidavit for Defendants, R. p. 313). Opinion of Court of Appeals, 16 N. Y. 2d at p. 57.

Summary of Argument

Plaintiffs' arguments are built on a platform which they first construct, not of any actualities nor of the statutory provisions they are attacking, but of conjecture, of speculation, of *their* opinion—which they stoutly assert as fact—of what the statute does and is, or does not do or is not. For example, Point heading I (Br. p. 25): the statute "levies an economic burden on the operations of the distilled spirits industry in other States". Or, another example (in connection with their supremacy argument): "even assuming the Act to be otherwise in furtherance of the State's police power which is not the case here" (Br. p. 43). Their arguments of constitutional violations must needs fall resting as they do on such groundless assumptions.

Appellants' arguments of the effect of the statute upon their profits and of the problems of compliance—conjectural and speculative and demonstrated to be hollow by distribution and pricing practices of the Industry generally and in New York State—have no bearing on the constitutionality of the statute; would have no bearing even if compliance would confront appellants with great difficulty and expense.

Section 9 is an internal regulation of the sale of liquor within the borders of the State and is, as is the State's entire Alcoholic Beverage Control Law, and as are the liquor laws of all the States (including the "monopoly" or "control" States) constitutionally within the State's power under the Twenty-first Amendment.

Moreover this is an enactment under the Police Power. Control of maximum prices of commodities and services is a proper exercise of the Police Power.

Were the subject of § 9 a product other than liquor (and thus the Twenty-first Amendment not determinative) and did the existence of the law have any repercussions in other States, this would not constitute interference with Interstate Commerce.

The Sherman Act and Robinson-Patman Act are also irrelative to § 9. The remedial objectives of the former are totally different from the remedial objective of § 9 and there is no issue of conflict or harmony between the federal acts and § 9, and no issue of supremacy. This would be so were the subject of § 9 a product other than liquor and thus the Twenty-first amendment not determinative.

POINT I

Section 9 is an internal regulation of the sale of liquor within the borders of New York State by those licensed by the State to traffic in liquor within the State. It thus is an enactment constitutionally within the State's power under the Twenty-first Amendment of the United States Constitution, as is the State's entire Alcoholic Beverage Control law and as are the laws of all states controlling traffic in liquor therein.

Every State in the United States has its own statute in respect to the sale of liquor therein. Regulation in each State is according to its own lights of what is in the public

interest of its people. Some States, after Repeal, continued to prohibit the sale of liquor. At least one still does. Seventeen States have prohibited private enterprise engaging at all in the sale of liquor, making such sale a State function.[15] These are the "monopoly" or "control" States. Distillers and manufacturers sell to these States on State terms. In all of the other States the sale is by private enterprise under State license, on conditions required to be met to qualify for State license and to retain such license.

Regulation is detailed and affects all aspects of operation in the license States. An aspect of such regulation in many States affects pricing, minimum and maximum as well. A price warranty, with the same purpose as our § 9, is a condition of distillers' selling to "monopoly" or "control" States (*supra*, p. 31).

Soon after Repeal various aspects of State regulation were challenged in the Courts. All were upheld by this Court. *Ziffrin, Inc.* v. *Reeves,* 308 U. S. 132, 138 (1939); *Indianapolis Brewing Co.* v. *Liquor Commission,* 305 U. S. 391 (1939); *Joseph S. Finch & Co.* v. *McKittrick,* 305 U. S. 395 (1939); *Mahoney* v. *Triner Corp.,* 304 U. S. 401 (1939); *State Board of Equalization* v. *Young's Market,* 299 U. S. 59; *Carter* v. *Virginia,* 321 U. S. 131 (1944).

An effort, some years after this group of cases, was made by the *State of California* to file a bill of complaint in this Court against the *State of Washington,* contending that Washington had erected trade barriers to sale of California wine within the State, thus violating the Commerce Clause, a violation which California contended was not sanctioned by the Twenty-first Amendment.

This Court's *Per Curiam* opinion in that case (358 U. S. 64 [1958]) disposed of the matter summarily, saying:

[15] One of these, Wyoming, licenses private retailers, *supra* p. 31.

> "The motion for leave to file bill of complaint is denied. U. S. Const., Amend. XXI, § 2; *Indianapolis Brewing Co.* v. *Liquor Control Commission,* 305 U. S. 391; *Joseph S. Finch & Co.* v. *McKittrick,* 305 U. S. 395; *Mahoney* v. *Joseph Triner Corp.,* 304 U. S. 401; *State Board of California* v. *Young's Market Co.,* 299 U. S. 59."

Just as does *California* v. *Washington* (*supra*), so do all of the above cited cases deny appellants' essential position that State liquor legislation must affirmatively promote temperance to come within the Twenty-first Amendment:

In *State Board* v. *Young Market Co., supra,* the California statute which exacted a $500. annual license fee for the privilege of importing beer from other States, obviously designed to protect local from foreign beer, was upheld.

In *Mahoney* v. *Joseph Triner Corp., supra,* a Minnesota statute imposing requirements as to liquor imported from other States not imposed on liquor processed within the State, was sustained, the Court noting that the statute "clearly discriminates in favor of liquor processed within the State as against liquor completely processed elsewhere." (304 U. S. at 403.)

Held valid in *Indianapolis Brewing Co.* v. *Liquor Control Commission, supra,* and *Joseph S. Finch & Co.* v. *McKittrick, supra,* were retaliatory laws enacted by Michigan and Missouri respectively, which prohibited the importation or sale of beer manufactured in a State discriminating against beer produced in Michigan (*Indianapolis Brewing Co.* case) or Missouri (*Finch* case). In the *Indianapolis Brewing* case, the contention that the Michigan statute violated the due process clause was rejected. (305 U. S. at 304.)

In *Ziffrin, Inc.* v. *Reeves, supra,* a State statute confining the business of transporting liquor within the State to licensed common carriers was held valid against attacks of violation of the Commerce Clause, Due Process and Equal Protection.

In *Carter* v. *Virginia, supra,* the State statute upheld imposed rigid requirements upon those who transported through the State.

Patently the legislation upheld in these cases was not designed to promote temperance; there is no merit to appellants' argument that all liquor legislation must affirmatively promote temperance to be valid under the Twenty-first Amendment.

Appellants concede, as perforce they must (Br., p. 30), the above decisions of this Court which have held that the Twenty-first Amendment gives to the States total authority to regulate the sale of alcoholic beverages within their borders. Appellants seek to make capital (Br. pp. 31-34) of *United States* v. *Frankfort Distillers,* 324 U. S. 293 (1945), *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.,* 377 U. S. 324 (1964) and *Department of Revenue* v. *James B. Beam Distillery Co.,* 377 U. S. 341 (1964).

These cases do not hold what appellants would wish they held. None diminishes the principle of *California* v. *Washington* and the decisions preceding it which this Court cites in that opinion.

The *Frankfort Distillers* case is one which it seems surprising that appellants should turn to. Defendants there, who included a number of the instant appellants (Footnote p. 293), were indicted for violation of § 1 of the Sherman Act. The United States Court of Appeals had reversed the District Court which had upheld the indictment. This

Court reversed the United States Court of Appeals and affirmed the District Court. The price-fixing conspiracy charged was interstate. Defendants there argued that the Twenty-first Amendment barred the prosecution. Mr. Justice BLACK, writing this Court's Opinion, said, without equivocation (p. 299):

> "That Amendment [21st] bestowed upon the states broad regulatory power over the liquor traffic within their territories [citing *Carter, Ziffrin* and *State Board* v. *Young's Market, supra*]."

The Opinion upheld the power of the United States to prosecute because (p. 299):

> "*The Sherman Act is not being enforced in this case in such manner as to conflict with the law of Colorado.* Those combinations which the Sherman Act makes illegal as to producers, wholesalers and retailers are expressly exempted from the scope of the Fair Trade Act of Colorado, and thus have no legal sanction under state law either. *We therefore do not have here a case in which the Sherman Act is applied to defeat the policy of the State.* * * *" (Italics ours.)

Thus the premise on which the decision was based was that it was the States which have control over sales of liquor and the issue was, did this particular State law foreclose Sherman Act prosecution, not vice versa.

Mr. Justice FRANKFURTER wrote a concurring opinion, which added to what Mr. Justice BLACK's majority opinion had said (pp. 300-302):

> "The Twenty-first Amendment * * * [subordinated] rights under the Commerce Clause to the power of a State to control, and to control effectively, the traffic in liquor within its borders. * * *
>
> "As a matter of constitutional law, the result of the Twenty-first Amendment is that a State may erect any barrier it pleases to the entry of intoxicating

liquors. Its barrier may be low, high, or insurmountable. Of course, if a State chooses not to exercise the power given it by the Twenty-first Amendment and to continue to treat intoxicating liquors like other articles, the operation of the Commerce Clause continues. Since the Commerce Clause is subordinate to the exercise of state power under the Twenty-first Amendment, the Sherman Law, deriving its authority from the Commerce Clause, can have no greater potency than the Commerce Clause itself. It must equally yield to state power drawn from the Twenty-first Amendment. And so, the validity of a charge under the Sherman Law relating to intoxicating liquors depends upon the utilization by a State of its constitutional power under the Twenty-first Amendment. * * *

"Thus the question in this case, as I see it, is whether in fact the policy of Colorado sanctions such an arrangement as the indictment charges. Such a policy may be expressed either formally by legislation or by implied permission. * * * In the view I take of the matter, *if a State authorized the transactions here complained of, the Sherman Law could not override such exercise of state power.* For, in any event, *if state policy did so authorize it, conformity with the state policy could not be deemed an 'unreasonable' restraint of interstate commerce.* But I do not find that Colorado has done so." (Italics ours.)

No more does *Hostetter* v. *Idlewild Bon Voyage Co.* support appellants. There the matter involved was wholly and purely an export operation at Idlewild International Airport (377 U. S. at pp. 325-6), so held by the United States Acting Commissioner of Customs.

This Court—Mr. Justice Black[16] dissenting in an opinion in which Mr. Justice Goldberg concurred (pp. 334-340) —held that this strictly foreign commerce operation did

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[16] Mr. Justice Black wrote the prevailing opinion in *United States* v. *Frankfort Distillers, supra.*

not require a license under the New York Alcoholic Beverage Control Law.

Mr. Justice STEWART's prevailing opinion first said (p. 330):

> "This Court made clear in the early years following adoption of the Twenty-first Amendment that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders. * * *
>
> "This view of the scope of the Twenty-first Amendment with respect to a State's power to restrict, regulate, or prevent the traffic and distribution of intoxicants within its borders *has remained unquestioned.* See *California* v. *Washington,* 358 U. S. 64. * * *" (Italics ours.)

The Opinion cited and discussed for this unequivocal affirmance of the State's "unquestioned" power over the traffic and distribution of intoxicants within its borders the cases we have cited *supra.* It made utterly clear what it meant by federal power over foreign commerce in liquor by explaining (pp. 333, 334):

> "Here, ultimate delivery and use is not in New York, but in a foreign country. The state has not sought to regulate or control the passage of intoxicants through her territory in the interest of preventing their unlawful diversion into the internal commerce of the State. As the District Court emphasized, this case does not involve 'measures aimed at preventing unlawful diversion or use of alcoholic beverages within New York.' 212 F. Supp., at 386."

In *Department of Revenue* v. *Beam Distilling Co., supra,* the third case upon which appellants rely, the Supreme Court had before it the question of a State tax on imported whiskey while it was in unbroken package prior to re-

sale or use by the importer. This Court held that this violated the Export-Import Clause of the Constitution.

The Opinion by Mr. Justice STEWART, so as to leave no doubt took pains to affirm once more the States' total authority over the distribution of liquor within their borders (p. 346).

> "We have no doubt that under the Twenty-first Amendment Kentucky could not only regulate, but could completely prohibit the importation of some intoxicants, or of all intoxicants, destined for distribution, use, or consumption within its borders. *There can surely be no doubt, either of Kentucky's plenary power to regulate and control, by taxation or otherwise, the distribution, use or consumption of intoxicants within her territory after they have been imported*" (Italics ours).

None of these three cases can lend any comfort to appellants' cause.[17] They all reiterate and reaffirm the States' authority to regulate sale of liquor within its borders, which makes valid a State enactment such as § 9.

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[17] Discussion of these cases in the New York Court's Opinions in the instant case; 16 N. Y. 2d, p. 58; 23 N. Y. A. D. 2d, p. 934.

POINT II

Control of maximum prices is a proper exercise of the police power. Section 9 thus being an enactment under the police power, the Legislature had the greatest leeway in determining the measure and method of effectuating its police power purpose for the protection of the People of the State from economic disadvantaging at the hands of an industry.

A State is not required to gear its police power measures to the merchandising maneuvers in which the industry affected engages for its profit. It is on such that appellants base their contentions of difficulty of compliance and their due process argument. Moreover their contentions are sheerly conjectural and speculative and are in fact contradicted by the pricing operations which obtain in the industry in and outside New York State.

The merchandising practices of the industry in New York State self-evidently support the need for Section 9 and its application to those whom it covers.

A. Control of maximum prices is a proper exercise of the police power.

Statutory regulation of pricing by private industry which by various formulae places a maximum on prices, is an approved exercise of the State Police Power. This Court has upheld such State statutory regulations on a variety of products and services far removed from the necessities of life. For example:

Gold et al. v. *DiCarlo et al.,* 380 U. S. 530 (1965) aff'g 235 F. Supp. 817, 820-1 (Three-Judge District Court, S. D. N. Y.) upheld the New York statutory provision (General Business Law § 169-c) fixing the limit which a theatre ticket broker may charge for theatre tickets above the price

printed on the ticket (The law makes violation a misdemeanor).

Olsen v. *Nebraska*, 313 U. S. 236 (1941) upheld a State statute fixing fees of private employment agencies;

Townsend v. *Yeomans*, 301 U. S. 441 (1937) upheld a State statute fixing maximum charges for handling and selling leaf tobacco;

Nebbia v. *New York, supra*, 262 N. Y. 259, aff'd 291 U. S. 502 (1934) upheld the New York statute authorizing the fixing of a maximum as well as a minimum price of milk;

O'Gorman & Young v. *Hartford Fire Ins. Co.*, 282 U. S. 251 (1931) upheld a State statute limiting commissions of agents of fire insurance companies.

The criterion of long ago which required a business to be "affected with a public interest" before its pricing could be the subject of regulation by State statute was discarded 30 years ago (*Nebbia v. New York, supra*, 291 U. S. at pp. 531-539), whatever it once was deemed to mean more than that "an industry" "is subject to control for the public good" (*id.* p. 536).

Appellants (Br., p. 54) agree that State legislation fixing "maximum price limitations" is upheld "because of industry abuses which can only be corrected by this device". They cite *Gold et al.* v. *DiCarlo*, 380 U. S. 520, *supra*, the theatre ticket case, as an example. If ever there were inundating evidence "of industry abuses" which called for maximum price legislation, the liquor industry pricing in New York State is it (*supra*, pp. 14-18, 28-31; *infra*, pp. 54-57).

Controlling maximum prices where necessary for the protection of the public is the public policy in New York

State (*e.g.*, General Business Law §§ 185, 169-c; Insurance Law §§ 180, 184-c, 186, 255[2]) and New York is not isolated in following such policy. It is at one with the police power, state and federal, to protect the consumer from being the victim of the vendors of the products it buys, be they necessities, comforts or even luxuries. *Cf. Head* v. *New Mexico Board,* 374 U. S. 424 [1963], *infra.* Government's effectuation of this policy is accomplished in a variety of ways, maximum mark-ups, approved prices, and so on.

In fact, by § 9 New York has not imposed upon appellants a maximum selling price or a maximum mark-up or a maximum profit as do some State liquor laws. South Carolina imposes on liquor wholesalers and retailers a maximum percentage mark-up over cost (South Carolina Code, Vol. I, p. 312, §§ 4-72). Minnesota permits the regulatory body to fix the maximum wholesale liquor prices (Minnesota Statutes § 340.09). New Mexico prohibits fair trade contracts in the sale of liquor which give wholesalers more than a specified percentage profit (New Mexico Statutes §§ 46-9-5, 46-5-6). Section 9 on the other hand left the liquor industry complete freedom in pricing in New York, with one restriction: that they charge in New York no more than the price for which they—seemingly—can profitably sell their products elsewhere. They are free to charge more elsewhere or less in New York. They are *not* required to *match* in New York their price elsewhere.

The statutory provision attacked here is one regulatory provision over an industry historically regulated; currently regulated in every State of the United States. "The regulation of the liquor traffic is one of the oldest and most untrammeled of legislative powers" (*Goesaert* v. *Cleary,* 335 U. S. 464, 465 [1948]).

Indeed, the business has, in the 17 "monopoly" States, been taken from the hands of private industry and made a function of the State.

Private liquor wholesalers—one group of appellants in the instant action—are non-existent in those States. Distillers—one group of appellants in the instant action—do business in those States with the State government on State terms. These terms include a provision such as that of § 9. (In the "monopoly" States the warranty does not cover wholesalers—because there are no wholesalers.) If it were beyond the power of New York to make this a regulatory requirement by statute, it would be beyond the power of the "monopoly" States to exact it by contract. If it is possible for appellants to comply with such a requirement because they choose to do so by contract, it is possible for them to comply with it under our statute. Obviously appellants accept the "monopoly" States' conditions in order to sell to them.

But the constitutionality of our statute is not to be determined by appellants' willingness to comply in the monopoly States because they deem they have no alternative, but conjuring up arguments in opposition because in New York they have a sellers' market with not one but a multitude of customers.

In *California Auto Association* v. *Maloney*, 341 U. S. 105, 110, this Court (by Mr. Justice Douglas) said:

> "Here * * * the power of the state is broad enough to take over the whole business, leaving no part for private enterprise. *Mountain Timber Co.* v. *Washington*, 243 U. S. 219; *Osborn* v. *Ozlin*, *supra*, [310 U. S. 53] p. 66. The state may therefore hold its hand on condition that local needs be serviced by the business."

Or to apply this principle to the instant situation "on condition" that the people of the State be not prejudiced economically by the pricing practices of this business.

Appellants, with fine disregard for their contradictory position that Section 9 would cause them infinite economic harm by curtailing their sales in New York, insist on their opinion that § 9 would not promote temperance and that this is the whole purpose of liquor sale regulation especially of the New York ABC Law. This is answered not only by the fact that it was found in 1964 that high prices have not in fact promoted temperance (*supra*); not only by the fact that appellants' views as to whether § 9 will or will not effect temperance are irrelevant; not only by the other purpose of the New York Beverage Law § 2 (the "protection" and "welfare" of the people of the State), but by the fact that authority for an exercise of the police power need not be found in the purpose provision of the comprehensive regulatory statute governing an industry; that the Legislature had authority to adopt this enactment under its "inherent" police power.

The police power encompasses all facets of community needs and is not limited, as appellants would suggest, to the protection of the physical welfare of the public. It encompasses protection of the people from "economic menace" to the general welfare, from economic disadvantaging at the hands of business (*Atlantic & Pacific Tea Co.* v. *Grosjean,* 301 U. S. 412, 427 [1937]; *Beauharnais* v. *Illinois,* 343 U. S. 256, 262 [1952], and see *infra*). It is a flexible power, adaptable to and extended with developing concepts of the areas of government's duty to the people and of areas of need for government intervention on behalf of the people. "Notions of public policy" which once obtained as to what interests of the people government may protect, are not to be given "continuing vitality as

standards by which the constitutionality of the economic" statutes "of the states is to be determined" (*Olsen* v. *Nebraska,* 313 U. S. 236, 247 [1941]; *Ferguson* v. *Skrupa,* 372 U. S., *infra,* 726 [1963].) *Supra* this subpoint specifically as to maximum price control.

Appellants are strong in their opinion (Br. p. 66) that Section 9 will not serve to remedy evil it was designed to remedy. (They describe it as "purported" evil.) Whether it will or not accomplish its purpose, this Court has said, is not for the judiciary, nor for those challenging a law, but for the Legislature.

"Choice of policy," "trial-and-error" is left to the Legislature in fulfilling its responsibility (*Beauharnais* v. *Illinois,* 343 U. S. 250, 262 [1952]).

The doctrine is, as expressed by Mr. Justice Black writing for this Court in *Ferguson* v. *Skrupa,* 372 U. S. 726 (1963) (at pp. 730-1):

> "courts do not substitute their * * * economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, 'We are not concerned * * * with the wisdom, need, or appropriateness of the legislation.' Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.' It is now settled that States 'have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.' [quoting from *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.,* 335 U. S. 525, 536 (1949).]"

As this Court said in *California Auto Assn.* v. *Maloney*, 341 U. S. 105, 110 (1951):

> "Whether * * * [a state's] program is wise or unwise is not * * * [a judicial concern]. See *Olsen* v. *Nebraska*, 313 U. S. 236; *Lincoln Union* v. *Northwestern Co.*, 335 U. S. 525. The problem is a local one * * *."

See also *Sproles* v. *Binford*, 286 U. S. 374, 388.

Appellants declare that the law is unreasonable; that wholesalers are under no "legal obligation" to give information to distillers as to their prices or the quantity of business that they do in a particular distillers' brand (Br. p. 62). Perhaps the practicalities are more effective than a "legal obligation", for we see (*supra*; *infra*), somehow the distillers do know both their wholesalers' prices and the quantity of the distillers' product the wholesalers sell.

Appellants to illustrate their argument that Section 9 is unreasonable, take the strange method of imagining possible devious utilization of it to depress prices in New York.

They evoke (Br., pp. 63-4, 65) a "blackmailing" wholesaler, a "reprehensible", "vindictive" wholesaler in "Chicago", with extortionist hands around the throat of a giant distiller breaking its prices in New York and destroying its New York wholesalers. This can hardly be taken seriously. We venture to say that appellants have never encountered such a one and do not expect to. ("Characteristics of the Industry" *supra.*)

They also pose a possible scheme by a "collusive" distiller (Br., p. 65). This "collusive" distiller could, they can see, conspire with an out-of-State wholesaler (Br., p. 65) to

> "sell the brands of the distiller's competitor at prices so low as to prevent the competitor from being able to market his brands in New York. The collusive distiller would then enjoy a marked competitive advantage in New York for the period his competitor was

> faced with the dilemma of selling at a severe loss in New York or not selling at all and risking the loss of his New York market. That such a fantastic spectacle is without the bounds of reason can hardly be questioned."

To this we might say that any distiller bent upon entering into a collusive agreement with a wholesaler to depress the price of a competitor's brand in New York State did not have to wait for Section 9 for help. He could if so inclined conspire with a wholesaler or wholesalers right in New York State today though the operation of § 9 is stayed.

We would also suggest that if distillers have the kind of control over wholesalers that their imagined situation describes, they can have no trouble in obtaining related wholesalers' prices of the distillers' own brands.

Above all the possibility of the kind of utilization of the statute for devious purposes which appellants envision —and there is little that is immune from unethical misuse —does not assuredly render a statute unconstitutional as "unreasonable" or on any other ground.

An enlightened exercise of the police power to protect the consumers of the product of a powerful industry which practices an old time control over the pricing of its product from manufacturer to consumer produced this statute. As Mr. Justice Douglas wrote in *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488 (1955):

> "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. See *Nebbia* v. *New York*, 291 U. S. 502; *West Coast Hotel Co. v. Parrish*, 300 U. S. 379; *Olsen* v. *Nebraska*, 313 U. S. 236; *Lincoln Union* v. *Northwestern Co.*, 336 U. S. 525; *Daniel* v. *Family Ins. Co.*,

336 U. S. 220; *Day-Brite Lighting, Inc.* v. *Missouri,* 342 U. S. 421."

In *Day-Brite Lighting, Inc.* v. *Missouri,* 342 U. S. 421, 423 (1952), Mr. Justice DOUGLAS had said:

> "the state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare * * *"

B. That a statutory enactment for the benefit of the People may have a burdensome impact or be a financial detriment to the industry it affects does not render it unconstitutional.

Appellants argue that there would be difficulties in complying with the statute and adverse financial effects.

First, of course, an exercise of the police power for the benefit of all the people overbalances and is not rendered invalid because its effect would be to cause expenses or be financially detrimental to those whom it restrains. (*California Auto Assn.* v. *Maloney,* 341 U. S. 105, 111 [1951]; *Day-Brite Lighting, Inc.* v. *Missouri,* 342 U. S. 421, 424 [1952]; *Standard Oil Co.* v. *Marysville,* 279 U. S. 582, 586; *Fox* v. *Standard Oil Co.,* 294 U. S. 87, 102; *Hegeman Farms Corp.* v. *Baldwin,* 293 U. S. 163, 170, *Sproles* v. *Binford,* 286 U. S. 321, 388-389). Moreover, the difficulties appellants envision are created of conjecture and speculation. This is obviously so because their litigation has prevented the statute from ever going into effect. The picture they draw of problems they would encounter in compliance at times borders on the fanciful and at times goes into the dramatic, as we have seen (*supra,* p. 47).

In any case on the most serious speculation and conjecture of their burdensome results, laws are not held unconstitutional. Courts do not join in such speculation "upon the nature or extent of the burden" and "make pro-

nouncement'' thereon. (*Federation of Labor* v. *McAdory*, 325 U. S. 450, 469 [1945].)

Moreover, appellants' arguments of difficulty in complying are entirely arguments of the effect on their profits. This is the thesis which crops up on page after page of appellants' brief. All of their arguments are based on their present merchandising methods and techniques to stimulate their sales.

As this Court said in *California Auto Association* v. *Maloney*, 341 U. S. 105, 111, *supra*:

> "Appellant's business may of course be less prosperous as a result of the regulation. That diminution in value, however, has never mounted to the dignity of a taking in the constitutional sense."

Our statute is under New York's police power for the benefit of all the People. New York is not required to gear such law to appellants' profit motive and merchandising techniques born of that. (*Fox* v. *Standard Oil Co.*, 294 U. S. 87, 102 [1935]; *Hegeman Farms Corp.* v. *Baldwin*, 293 U. S. 163, 170 [1934]; *Sproles* v. *Binford*, 286 U. S. 374, 389 [1932].)

Appellants seemingly are concerned that upholding this law would be an invitation to legislation in other States inimical to their interests. If that would transpire, so be it. Before this Court is the issue of the validity of *this* law.

Appellants' conjecture and speculation of difficulties in complying are contradicted by the realities ("Characteristics of the Industry", *supra*).

We comment first on appellants' protests of such difficulties in respect to the distillers' own prices to wholesalers, curious as such argument is.

Promotional devices to which they resort in other States to stimulate sales appellants argue would confront them with difficulties in complying with § 9 since under the section New York prices would be required to be no higher than the lowest price outside the State though that price is not a flat simple price, but is reached by incentive programs to spur the wholesaler or retailer to push up the sales of the distiller's brand.

It is to be remembered that as to prices in the 17 Monopoly States, there would be no problem at all. There is a unit within the larger distiller companies devoted exclusively to Monopoly State sales which has the information as to selling prices to those States at its fingertips. In some of these States, for example, Pennsylvania (Phillips' Affidavit for Defendants, R. 313), distillers are required to have their prices reflect promotional allowances in other States.

If the distillers can have or obtain such information for any State, they can do so for New York. In the Monopoly States the problem would appear to be more difficult than in New York, since in those States the warranty must be of no higher prices than the lowest price in other States *at the time of sale* to the Monopoly State. In New York it would be as to the prices in other States in a preceding month. Seemingly distillers solve the problem for the Monopoly States, whether by allowing a round figure in the Monopoly State prices to take care of discounts, allowances, etc. in other States, or otherwise. They solve it.

Finally, essentially the distillers know the lowest price for which they sell their brands. Their promotional techniques may be to charge that lowest price, now here, now there, to increase sales at one place or another, but the lowest price for which they will sell a brand they know

(Street deposition in *Laird* v. *Gage, supra;* testimony of Robert W. Coyne, President, Distillers Spirits Institute, before joint legislative committee for study of alcoholic beverage control [Ex. C to plaintiff's order to show cause] R. pp. 49-50). This is all they need to know for Section 9.

We come then to the prices to retailers by related wholesalers.

All that has been said as to determining distillers' prices[18] outside New York State obtains as to wholesalers' prices. On the matter of knowledge by the brand owner of wholesale prices of its brands throughout the country, this is, as we have seen, an Industry marked by unique discipline. We have seen *supra* (Lind Affidavit for Plaintiffs, R. 59-60) how very much in minute detail the distillers know about the business of their distributor. The brand owners, thus, are fully aware of how their brands are faring[19] and how they are being handled by the limited number of related wholesalers to whom their brands are entrusted.

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[18] They must have their prices all over the United States months in advance of the prices being in effect. The existence of so many State price posting or filing requirements makes it essential that there be precision in projecting prices in advance—a month, two months or three months in advance. Because there are among these States minimum price requirements, minimum mark up requirements, maximum price requirements, there must be exactitude in projection of prices.

[19] This computerized age will ease any problems. Business Week for September 25, 1965 in its section "Marketing Briefs" has an item entitled "Schenley gets instant market information from computerized video data system." The article starts with the following: "By punching some buttons and looking at a desk-top video screen, executives of Schenley Industries now can tell 'instantaneously' how their company's wines and spirits are selling all over the country."

It goes on: "The 3½-in. by 4½-in. screens can flash combinations of up to 3-million bits of information stored in the computer,

(Footnote continued on following page)

We have seen *supra* ("Characteristics of the Industry") that generally wholesale prices apparently are at least suggested by the distillers. It therefore would seem that they know the wholesale prices of their brands everywhere without inquiring. For that reason, and because it strains credulity to accept that the wholesaler who has an exclusive franchise in a brand or who does the substantial portion of his business in a distiller's products, will risk the chief bulwark of its business by defying an inquiry as to prices from the distiller, the distiller knows the running prices of its brands at all times.[20] And see *infra* as to the solution of the occasional particular problem in making an affirmation.

We are reminded again that § 9 does not require matching prices with other States; it does not ask that the prices in other States be stated. It merely asks that New York prices be *no higher*.

Not only is it known to all who are acquainted with the Industry that the brand owners know in advance the whole-

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(Footnote continued from preceding page)

showing how a brand is doing in any or all sizes in any market, city, state, or national; at any or all of the over 400 distributors; sales for each month or the year to date, compared to earlier periods; prices and, eventually perhaps, figures on competing brands.

"Information also is beamed over two larger, 23-in. monitors for group viewing, and is printed in more conventional 'hard' form by teletype machines. Data on prices and orders are fed in daily, and on sales and inventories monthly. * * * the system will save 2½-min. to 35-min. on simple tasks, and up to three or four hours on complicated ones." That is it will make even more instantly available information already constantly available.

[20] Appellants also speak of the related person wholesaler in New York being bound by the related person wholesalers' prices in another State. They are, as we saw above, generally bound by distiller suggested prices, so that as a practical matter nothing is changed. These wholesale prices tend to be uniform throughout a State irrespective of wholesalers' costs of operations as between metropolitan areas and smaller communities. See *infra*.

sale prices of their products and have a role in determining these prices, but were this not known, it would be a rational inference from the minimum consumer resale price provisions in the statutes of many States. In some States there are also minimum wholesale price provisions (Moreland Commission Report #3, Appendices A and B, pp. 32-34).

For the latter States, wholesale prices unquestionably are known.

Reasoning from the retail prices which are fixed mainly by the distiller under the statutes, and in "Fair Trade" contracts by distillers as in New York in this last year (*supra* p. 21), necessarily they are fixed with the retailer's mark up a consideration. For that mark up, the wholesaler's price must be the base. Thus the distiller's voice is heard is respect to the wholesale price; the wholesale price is known to the distiller.

The Marketing and Pricing Situation in New York

The present marketing and pricing situation in New York is eloquent of the knowledge distillers have to enable them to comply with § 9, as to wholesalers' prices and by the same token of the practices which indicated the need for the provision in section 9 covering related wholesalers as well as brand owners prices.

What we note here is found in New York price schedules filed with the State Liquor Authority and in trade publications in this and other States.

Restricted wholesaling

In New York State, as elsewhere except in the rare State where this may be forbidden ("Characteristics of the In-

dustry", *supra*), distillers typically restrict the wholesalers through whom they sell their products. Some wholesalers have the distribution of all of a distiller's brands, some of only a single brand or a few brands. Distillers include the names of their restricted wholesalers with the brands they are authorized to distribute as part of their price schedules filed with the New York State Liquor Authority.

The same wholesaler, with few exceptions, is not given distribution by the giant distiller of their brand of the same class—price class—if it handles the same price class brand of another of the giant distillers.

This merchandising practice is of course not required by New York law. It is the distillers' own merchandising practice and one which seemingly by common consensus the major distillers follow.

Wholesale prices.

In New York the statutory provisions in respect to liquor prices prior to the 1964 statute were that (a) minimum consumer resale prices were fixed by the distiller (Alcoholic Beverage Control Law § 101-c[21]); (b) a distiller could not discriminate in prices as between the wholesalers to whom the distiller sold, nor could a wholesaler discriminate in prices as between the retailers to whom the wholesaler sold (§ 101-b [2, a]).

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[21] It is not at all contradictory as appellants suggest (Br. pp. 28, 49), that § 9 was enacted while the Legislature continued to allow Feld-Crawford to cover liquor retail sales when the state enforced minimum consumer resale price provision was repealed. On the contrary, the Legislature realizing that there could be agreements under the comprehensive Feld-Crawford Act, enacted § 9 with the purpose that Feld-Crawford agreements would be at lower prices to consumers if retailers and wholesalers were paying lower prices for liquor to their suppliers than they had been in the past.

But there was nothing in the law which directed or in any way inhibited the freedom of each wholesaler in its prices to retailers—just so its price to retailers was the same for all to whom it sold.

Apparently, however, somewhere there has been influence on the wholesalers' prices to retailers. Because in any given month wholesalers in New York City—and in the State—typically charge the same price to the penny for the same brand.[22] The wholesale schedules of prices filed with the State Liquor Authority reflect this—month after month, year after year.

We look at some filed price schedules and price advertising of the products of some of the plaintiffs in this action, Seagram, Hiram-Walker, National Distillers. We take some of Seagram's products, for example. Seagram's Vice-President and General Counsel, Mr. Frederic J. Lind, submitted the lead affidavit on behalf of the appellants in the instant case on inability to comply. The advertised wholesale price of their well known brands, 7 Crown, Four Roses, Seagram's V. O., Wilson's That's All, by every wholesaler in New York City and the wholesale price in their monthly filed price schedules all over the state including upstate New York in December 1964, in every month of 1965 and right through January 1966 has been exactly the same. (All this after Section 101-c,

[22] Appellants profess concern for New York State wholesalers whose operating costs—they say—may be higher than in another state. This is another of their specious arguments. Because for one thing the sales volume being larger in New York total income is larger. Secondly operating costs are necessarily higher in some areas of New York State than in others, as they are in different parts of all states. But somehow wholesale prices tend to be similar in all parts of a given state. Finally, the prices wholesalers pay for their products would be lower by reason of § 9.

the minimum consumer price provision was no longer in effect.) The advertised wholesale price[23] and the filed monthly wholesale prices for Hiram Walker products (Canadian Club and Imperial) was exactly the same in December 1964, in every month of 1965 and in January 1966 by its subsidiary in New York City through whom it distributes to retailers in New York City and also by its wholesalers upstate. The same is true of National Distillers (affidavit of Mr. R. R. Hermann, Jr. in this action). It is interesting that National Distillers wholesaler in Buffalo and Rochester which adhered to the same wholesale price is McKesson & Robbins. This sheds interesting light on their affidavit in this case (R. 199).

In fact Beverage Media (and other journals of this type) carry a Price and Brand Index with the wholesale price of each brand. The wholesale prices for the brand advertised by each wholesaler tends not to deviate from the prices listed in this Index.

Patently, the free enterprise for which appellants argue so vehemently in their brief has not in this Industry operated in New York State. To sum up:

1) the minimum consumer resale prices permissible and enforced under § 101-c remained at such high level—among the highest in the nation;

2) the wholesaler to retailer prices of all wholesalers for the same brand within a geographic area of the State and even generally throughout the State, have tended to be uniform—and high.

The need for § 9 is self-evident.

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[23] *Beverage Media, Metropolitan Edition.*

C. As to appellants' "vagueness" argument.

Appellants conjure up a variety of professed worries on the subject of what would be regarded as a "related wholesaler"; as to what is meant by the word "substantial" in the definition of related person. This is their argument that the statute is "intolerably vague" (Br., p. 66).

As appellants themselves recognize (Br. p. 38), the federal antitrust acts use the phrase "to substantially lessen" competition. Yet these acts have never been held unconstitutional because the phrase is not defined. The rule of reason in the context of the acts and their purpose has obtained in finding what conduct came within the law and what did not. The Robinson-Patman Act also declares it unlawful to discriminate in price where the effect of such discrimination may be "substantially to lessen" competition. That act too has not been held unconstitutional because the phrase has not been defined. Again the rule of reason has been used in applying it.

As the New York Supreme Court (45 Misc. 2d at p. 956) said in respect to the "vagueness" argument, legislation is and often must be enacted in broad outline leaving to administrative officials the duty of determining "facts and conditions" upon which the operation of a statute depends.

In *Board of Governors* v. *Agnew,* 329 U. S. 441 (1947), the meaning of the phrase "primarily involved" was at issue and the question became whether if "primarily" connotes "substantiality", the statutory provision involved was sufficient.

This Court said:

> "But we think it plain under our decisions that if substantiality is the statutory guide, the limits of administrative action are sufficiently definite or ascertainable

> so as to survive challenge on the grounds of unconstitutionality. *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, 397-400; *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126, 142-146; *Yakus* v. *United States,* 321 U. S. 414, 424-428; *Bowles* v. *Willingham,* 321 U. S. 503, 512-516." (329 U. S. at p. 449.)

See also, *e.g., New York Central Securities Corp.* v. *United States,* 287 U. S. 12, 24 where the phrase "public interest" was held an adequate standard; and *National Broadcasting Corp.* v. *United States,* 319 U. S. 190, 225-226 (1943); *Federal Radio Comm'n* v. *Nelson Bros. Co.,* 289 U. S. 266, 285 ("public convenience, interest or necessity"); and see *Sproles* v. *Binford,* 286 U. S. 374, 393.

Be it remembered that the federal anti-trust acts all contain criminal penalties. Appellants here express trepidation about innocent failure to have all information or accurate information in making the affirmations since a false affirmation is declared by the statute to be a misdemeanor. Of course only if it is proven that an affirmation were made with knowledge that a statement therein is false would it constitute a misdemeanor. The statute is to be construed as so requiring (*Morissette* v. *United States,* 342 U. S. 246, 250 *et seq.*).

Section 9 seeks the lower price in New York—not to prosecute the industry. It of course would only be a course of conduct, indicating knowingly making false affirmations that would induce the State Liquor Authority to initiate a prosecution. The State Liquor Authority knows and plaintiffs know that falsification in the affirmations with knowledge that the statements made are untrue, would have to be proven beyond a reasonable doubt for prosecution.

> "That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold

> the language [of a statute] too ambiguous to define a criminal offense." (*U. S.* v. *Petrillo,* 332 U. S. 1, 7).

> "Statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within the language." *U. S.* v. *National Dairy Corp.,* 372 U. S. 29, 32 (1963).

See also, *U. S.* v. *Wurzbach,* 280 U. S. 396, 399.

D. The equal protection argument is without basis because there is readily discernible reason for the scope of coverage of § 9.

All that need be said in answer to appellants' argument (Br. Point V) of denial of equal protection in that neither non-related persons, private brands or wine are covered by § 9, is that it is easy to see why they were not.

"Private brands" have always been excluded from provisions of the Alcoholic Beverage Control Law which apply to "brand" liquors (§ 101-b, former ¶ "e" of subd. 3).

Wine has always been dealt with specially in the Alcoholic Beverage Control Law (Article 6 "Special Provisions Relating to Wine").

The source of control over liquor prices was found to be the distillers (*supra,* pp. 24-31). Control over pricing by wholesalers not related to the distiller would not be the same as over related wholesalers. Therefore, non-related wholesalers are not included in § 9.

To exclude all of these is therefore constitutionally permissible classification.

> "Exact equality is no prerequisite of equal protection of the laws within the meaning of the Fourteenth Amendment."
>
> *Norvell* v. *Illinois,* 373 U. S. 420, 423 (1963).

"The Constitution does not require things which are different in fact *or opinion* to be treated in law as though they were the same." (Italics ours.)

Tigner v. *Texas*, 310 U. S. 141, 147 (1940).

That others who might have been included in a statute were not, does not render a statute unconstitutional.

United States v. *Carolene Products Co.*, 304 U. S. 144, 151;

Williamson v. *Lee Optical*, 348 U. S. 483, 489 (1955).

POINT III

Were the subject of Section 9 a product other than liquor (and thus the Twenty-first Amendment not determinative), Section 9 does not interfere with interstate commerce; the Sherman Act and Robinson-Patman Act are irrelative to Section 9 and appellants' supremacy clause argument accordingly fails.

Even if this were not State regulation of the sale of liquor, the statute is not in violation of the Commerce Clause, or of the Sherman Act or of the Robinson-Patman Act.

Contrary to the impression appellants' argument seeks to create, the Commerce Clause does not render invalid State laws whose mere existence might have a remote influence in other States.

If that were not so, much legislation in more enlightened States affecting industries which operate nationally would be unconstitutional simply because of what other States might do or not do or permit or not permit. This is

appellants' argument of the influence § 9[24] may have in other States.

(A)

As to Appellants' Interstate Commerce Argument.

The Interstate Commerce Clause does not have any such reach as appellants would give it.

As Mr. Justice FRANKFURTER said in *Osborn* v. *Ozlin*, 310 U. S. 53, 62 (1940):

> "* * * the question is not whether what Virginia has done will restrict appellants' freedom of action outside Virginia by subjecting the exercise of such freedom to financial burdens. *The mere fact that state action may have repercussions beyond state lines* is of no judicial significance so long as the action is not within that domain which the Constitution forbids." (Emphasis supplied.)

In another opinion *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435 (1940) upholding a Wisconsin tax, Justice FRANKFURTER wrote (pp. 444-445):

> "The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the state has not given the less merely because it has *conditioned* the demand of the exaction upon *happenings outside its own borders*." (Italics ours.)

The State police power is if anything greater than State taxing power.

Among the host of opinions to the same effect as *Osborn* v. *Ozlin* and *Wisconsin* v. *J. C. Penney Co.*, see *Hoopeston* v. *Cullen*, 318 U. S. 313, 320-321 (Mr. Justice BLACK, 1943);

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[24] Plaintiffs' argument (Br. Point VI) concerning subdivision 3(a) of § 7 we have dealt with *supra*, pp. 3-4, 23-24.

Atlantic & Pacific Tea Co. v. *Grosjean,* 301 U. S. 412, 426-427 (1937). The "repercussions" of one State's laws upon the activities of a business which operates nationwide is "a consequence of modern practice of conducting wide spread business activities throughout the United States" (*Watson* v. *Employers Liability Corp.,* 348 U. S. 66, 72, 73 [Mr. Justice Black, 1954]). Each State in which such businesses operate may without violating the Interstate Commerce Clause adopt laws affecting them on matters of local concern even where in doing so interstate commerce is in some measure affected.

> "There is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even to some extent, regulate it [citing cases] * * * *when the regulation of matters of local concern is local in character and effect,* and its impact on national commerce *does not seriously interfere with its operation,* * * * *such regulation has generally been held to be within state authority* [citing cases]."
>
> (*Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, 767 [1945]; emphasis supplied.)
>
> "'Legislation in a great variety of ways may affect commerce * * * without constituting a regulation of it within the meaning of the constitution.'"
>
> (*Huron Cement Co.* v. *Detroit,* 362 U. S. 440, 444 [1960].)

The Court in the *Huron* case cited the "teaching" of the Supreme Court's decisions to which appellants in this case do violence in their arguments of constitutional invalidity (Br. Points II, III, IV):

The *"teaching of this Court's decisions",* said Mr. Justice Stewart, *"enjoin seeking out conflicts between state*

and federal regulation where none clearly exists" (*id.* 362 U. S. at p. 446).

The argument appellants make here as to problems they would have if other States were to enact similar or conflicting statutes, was likewise made in the *Huron* case. The Court there simply noted that appellants had pointed to no "competing or conflicting" regulations (*id.* p. 448). It would not, however, have been an effective argument had th[illegible] been such showing (*Watson* v. *Employers Liability Corp.*, 348 U. S. 66, 72 [1954]).

Even in the field of operation of a radio station, which is under the regulatory jurisdiction of a federal agency, the Federal Communications Commission, this Court unanimously held (Mr. Justice Stewart writing the opinion for the Court, Mr. Justice Douglas concurring in the result and Mr. Justice Brennan writing a concurring opinion), in *Head* v. *New Mexico Board*, 374 U. S. 424, 1963 that a State statute could restrict certain occupations from advertising and thus restrict the radio station from accepting and broadcasting such advertisement.

> "Without doubt the appellants' radio station and newspaper are engaged in interstate commerce", said the Court (p. 427).
>
> "Unquestionably" enjoining this advertising "imposed some restraint upon that commerce. But these facts alone do not add up to an unconstitutional burden on interstate commerce" (pp. 427-8).
>
> "A state law may not be struck down on the mere showing that its administration affects interstate commerce in some way" (p. 429).

The Court added that it could not find

> "that the legislation impinges upon an area of interstate commerce which by its nature requires uniformity of regulation" (p. 429).

The same is true of the instant case. Undoubtedly, the radio station in the *Head* case could accept in other states the advertising which the State statute involved in the action (New Mexico) restricted, and indeed could undoubtedly broadcast the same advertisement in another state within its broadcast range which it could not accept in New Mexico. Moreover, the radio station was licensed by a Federal agency which had detailed jurisdiction over it including the content of radio advertising (374 U. S. 436, 437). Another Federal agency, the Federal Trade Commission, has jurisdiction over false, misleading or deceptive advertising designed for radio broadcast, 374 U. S. at p. 441.

Nevertheless, this Court held that all this did not displace State regulation (374 at p. 442). The subject matter, held this Court, was not one admitting "only of national supervision."

The State statute in the case, said Justice Brennan at p. 445 is one

> "designed principally to protect the State's consumer's against a local evil by local application."

Such legislation, said the opinion, concerned

> "with the * * * protection [of consumers] against fraud and deception embodies a traditional state interest of the sort which our decisions have consistently respected."

"Nor is such legislation required to yield", said Justice Brennan, even though "it may in some degree restrict the activities of one who holds a federal license." 374 at p. 445.

This decision upheld a State police power statute restricting the operation in one state of (1) a federal licensee (2) policed by two Federal agencies and (3) un-

questionably operating in interstate commerce. It assuredly requires rejection of the argument of appellants here that Section 9 violates interstate commerce or is invalid by reason of the supremacy clause. For their arguments to prevail this Court would, we submit, be required to withdraw its decisions which have "consistently respected" the "traditional state interest" in legislation protecting the interest of the consumers of the State (*cf.* 374 U. S. at p. 445).

Appellants (Br. p. 48) cite *Baldwin* v. *G. A. F. Seelig, Inc.,* 294 U. S. 511 (1935). But as Justice Cardozo, who wrote the opinion, said of the case when distinguishing it in *Henneford* v. *Silas Mason Co.,* 300 U. S. 577, 585 (1937), "the case is far apart from this one." So is *Seelig* "far apart from" the present case.

The *Seelig* case barred milk dealers buying milk outside New York from selling in New York unless they had paid for the milk in the other State the price they would have to pay for it in New York. This is the exact opposite of § 9, the statute here. The statute in *Seelig* (see Justice Cardozo's summary in *Henneford* [300 U. S. at pp. 585-586] of his opinion in *Seelig*) directed what shall be done in other States; § 9 directs what appellants shall do in New York State.

The principle which sustains § 9 is, as Justice Cardozo said in *Henneford* (at p. 587):

> "A state, for many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere."

See further, for example, *California* v. *Thompson,* 313 U. S. 109, 113 (1941); *Parker* v. *Brown,* 317 U. S. 341, 360 (1943).

We conclude this subpoint with the following footnote in *Hostetter* v. *Idlewild Liquor Corp.,* 377 U. S. at p. 331 *supra:*

> "Quite independently of the Twenty-first Amendment, the Court has sustained a State's power, within the confines of the Commerce Clause, to regulate and supervise the transportation of intoxicants through its territory."

(B)

As to Appellants' Sherman Act and Robinson-Patman Act Arguments

Appellants, since of course there is no federal statute on the subject of § 9, seeking to spell out a supremacy clause argument, do so by a series of steps. They turn to the Sherman Act and the Robinson-Patman Act. But they find that they require something more, because § 9 is not on the same subject as either the Sherman Act or the Robinson-Patman Act. Therefore, they argue that § 9 is not in accord or parallel with the policy of these two laws (Br. Point II).

Once more we recall that conflicts between state and federal regulation should not be sought where "none clearly" exist (*Huron Cement Co.* v. *Detroit, supra,* 362 U. S. at p. 446).

A State statute is not "displaced" "when the possibility of conflict with federal policy" is "remote". Such "potential conflict is too contingent" too remote to require "a hands-off directive to the states"; to a State seeking to bring what in its judgment is equitable non-discriminatory consumer prices to its people (*International Association of Machinists* v. *Gonzales,* 356 U. S. 617, 621 [1958]).

The question is, as Mr. Justice BLACK wrote in *Hines* v. *Davidowitz,* 312 U. S. 52, 67, whether the State law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the federal law with which it is alleged it conflicts.

What "obstacle" can a State law requiring all distillers and their related wholesalers to charge in the State no higher than the lowest prices they charge outside the State, present to operation of the Sherman Act or of the Robinson-Patman Act?

As this brief is being written, this Court on its last decision day, January 31, 1966, issued its opinion in *Brotherhood of Locomotive Engineers et al.* v. *Chicago R. I. & P. R. Co. et al.,*[25] in which the argument was made that the Federal government had actually pre-empted the field primarily through a 1963 Federal law so as to render unconstitutional State statutes fixing requirements as to railroad "crew consists" for interstate railroads when operating within the State. Mr. Justice BLACK writing for the Court said (quoting from *Missouri Pac. R. Co.* v. *Norwood,* 283 U. S. 249):

> "'In the absence of a clearly expressed purpose so to do Congress will not be held to have intended to prevent the exertion of the police power of the States for the regulation of the number of men to be employed in such crews' 283 U. S. at p. 256."

The interstate railroads suing to have the statutes declared unconstitutional had charged also that the statutes were "contrary to the National Transportation Policy expressed in the Interstate Commerce Act" (34 U. S. Law Week 4103).

[25] 34 U. S. Law Week 4103, 4104.

1. As to Appellants' Sherman Act Argument.

Appellants characterize § 9 as a form of anti-trust legislation (Br., p. 21). They persist in quoting one phrase of § 8, the purpose section of Ch. 531 and omit to quote the entire sentence of which it is a part, thus taking the phrase they quote out of context and giving a totally erroneous impression of the sense in which it was used. Appellants, contradicting the Legislature which enacted the statute, the Governor who recommended and appróved it, proclaim their opinion of its purpose. They then make their Sherman Act and supremacy clause argument, not on what § 9 *is*, but what appellants call it.

The purpose of § 9 is declared in § 8 in plain words by the Legislature to be this:

> "In order to forestall possible monopolistic and anti-competitive practices *designed to frustrate the elimination of such discrimination and disadvantage*, it is hereby further declared that the sale of liquor should be subjected to certain further restrictions, prohibitions and regulations, and the necessity for the enactment of the provisions of section nine of this act is, therefore, declared as a matter of legislative determination." (Emphasis ours.)

As to the use in Section 8 of the phrase appellants refer to over and again—

The Legislature was repealing the ABC Law provision fixing consumer prices with the goal of eliminating the discrimination against New York State consumers in the price they pay for alcoholic beverages. This consumer price fixing was *distiller* fixed. It did not take clairvoyance to anticipate that the distillers with the control they had over the price of alcoholic beverages all down the line might take measures to keep distiller and wholesale prices high so that the elimination of the price fixing section would not lower the price the retailer would have to charge to the

consumer. It was to "forestall" such business measures "designed to frustrate the elimination of such discrimination and disadvantage" which the Legislature described as "monopolistic and anti-competitive practices" that § 9 was enacted.

Section 9 provides that each brand price to wholesalers and retailers in New York shall be no more than the lowest price for that brand outside New York.[26] That provision it was hoped would have the *consequence* of forestalling or eliminating monopolistic or anti-competitive practices, if any, as between brand owners or wholesalers; the *consequence* of application of the provision would be the independent action of each brand owner based on its prices outside New York. This statute does not act upon monopolistic or anti-competitive practices *between competitors*. The Sherman Act does.

There are in the economists' sense, monopolistic and anti-competitive practices which fall short of being Sherman Act violations. (*Theatre Enterprises, Inc.* v. *Paramount Film Distribution Corp.*, 346 U. S. 537, 541 [1954].) Under its police power the New York Legislature could act to relieve the people of the State from the high prices *resulting* from such practices without resorting to its Donnelly Act or relying upon the Sherman Act for anti-trust action.

[26] As the Court of Appeals opinion said (16 N. Y. 2d at p. 56):

"In effect the dependence of the New York price on the maximum price of the distiller for his brand elsewhere is to tie the price in this State in to a national price. * * * The effect is on what the distiller charges here and is an effect closely associated with the sale and distribution of liquor within the State.

"That it reflects and depends on events outside the State does not condemn it. It could as well have been tied into the national average price of liquor or the national cost of living index. It is a device to end a demonstrated discrimination against the New York consumer and it is a device within the power of the State to employ in this regulated activity."

Since this is not an anti-trust statute, what the Sherman Act does or does not permit or declare illegal simply has nothing to do with § 9.

Appellants go so far as to argue (Br., p. 28) that they could be charged with violating the Sherman Act in "collecting and disseminating this [price] information". This, as so many of their arguments, is manifestly absurd. Business organizations and trade associations constantly do this. Activities are Sherman Act violations only when they are part of an anti-Sherman Act conspiracy.

In *Maple Flooring Manufacturers Assn.* v. *United States,* 268 U. S. 563 (1925) at pp. 577, 579 this Court made very clear indeed that it is only when collecting and disseminating prices is part of a conspiracy evidenced by other activities to be in restraint of competition that it is in violation of the Sherman Act. *American Column & Lumber Co.* v. *United States* cited by appellants (Br. p. 28) is discussed 268 U. S. at p. 580 as illustrative of such a conspiratorial scheme. For a distiller to obtain its own and its related wholesalers' prices in order to comply with a State statute is hardly a conspiracy. Especially in an industry whose prices are in almost every State required to be filed with a State agency.

Finally on this point, we are reminded that there are anti-monopoly provisions[27] common to the liquor laws of nearly all "license" States. They are the provisions interdicting interest of one level of the liquor industry in the business of other levels of the industry. These laws take

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[27] They contradict appellants' assertion (Br. p. 22) that any tendency of the alcoholic beverage industry to price in an anti-competitive fashion "is a concern of the federal government and is not a problem local in character", and are in harmony with this Court's "long recognized power" in the States to enact such measures. *Watson* v. *Buck,* 313 U. S. 387, 404 (Mr. Justice Black, 1941).

the form not only of prohibiting outright ownership or management interest of one in the other, but the extension of credit or loans by one level to the other which would give a measure of control by the one upon the other. New York has such statutory provisions (§ 101, subd. 1, ¶¶ a, b, c; § 105, subds. 16, 17; § 106, subds. 13, 14). Such provisions have always been treated as state regulation of the industry to prevent monopolistic practices, not as anti-trust legislation and never required to be measured against the Sherman Act to determine whether they conflict or are harmonious with it. *United States Department of Commerce Report,* 1941, *State Liquor Legislation,* p. 20; *Pickerill* v. *Schott,* 55 So. 2d 716, 718 (Fla.), cert. den. 344 U. S. 815 (1952); *Weisberg* v. *Taylor,* 100 N. E. 2d 748, 409 Ill. 384 (1951); *Neel* v. *Texas Liquor Control Board,* 259 S. W. 2d 312, 316 (1953, Tex.).

2. As to Appellants' Robinson-Patman Act Argument.

Appellants' Robinson-Patman argument is, like so much else in their case, premised on their unfounded characterization of the statute. The argument fails because its premise is invalid.

As illustrative: They say (Br. p. 20) "Section 9 assumes that a geographical price differential is an inherently anti-competitive act" and the Robinson-Patman Act does not. Section 9 makes no assumption whatever about the relationships and practices with which the Robinson-Patman Act deals because that is not the problem with which Section 9 sought to deal. The problem was prices to consumers in New York State by each distiller and related wholesaler independently for its products, not in competition with another distiller's products. Distillers generally were found to be as one and as one through their wholesalers in keeping those prices high.

There were no *competitive* practices among distillers or wholesalers which affected New York prices. On the contrary. The unity of effort in this very lawsuit in which every major distiller and liquor distributor, 62 strong, has joined, demonstrates their singleness of policy insofar as pricing practices go.

Section 9 thus was not enacted to deal with competition among any segment of the liquor industry. Section 9 was enacted as one other provision enacted, in addition to repeal of § 101-C (the distiller fixed consumer price provision), for the purpose of achieving reduction of prices by *all* distillers and related wholesalers to New York consumers. The Governor and the Legislature foresaw—and their foresight has been demonstrated to have been prophetic by the same continued pricing practices of the liquor industry in New York State in the 15 months that have passed since § 101-C has been repealed and Section 9 has remained immobilized—that the repeal of Section 101-c alone would accomplish nothing. They foresaw that judging from the Industry's known practices, they would all as one keep consumer prices high by keeping distiller and wholesale prices high. It was to meet this that Section 9 was adopted.

To repeat: the premise of appellants' Robinson-Patman argument is just wrong; Section 9 is utterly unrelated to the Robinson-Patman Act, there is no issue of conflict between them, and discussion of the Act and the Supremacy Clause have no place in this action, as the State Courts have held.

To sum up in brief further the total absence of any relation between Section 9 and the Robinson-Patman Act:

1. Section 9 does not direct appellants to give discounts etc. to New York wholesalers and retailers which they give

in other states. It makes the measure of the prices in New York their lowest prices outside New York. How appellants arrive at outside New York State prices is appellants' affair. New York is concerned only that the New York prices be not higher than the out-of-State prices.

2. If appellants' Robinson-Patman Act argument were sound, New York has for 22 years been violating the Act —as have other States—in putting a total ban on price discrimination by brand owners and wholesalers among their customers, without any exception for reasons of meeting competition (Alcoholic Beverage Control Law § 101-b, the section to which § 9 makes additions).

3. Section 9 is concerned with *a* distiller's *own* brand prices to those who purchase its products in New York State—with complete disregard of competitors' activities and prices. The Robinson-Patman Act is concerned with competition and relationship among competitors.

4. Finally, if § 9 violates the Robinson-Patman Act, so do the Monopoly States.

Appellants by their contracts with the Monopoly States are required to warrant that their prices to them are no higher than their lowest price elsewhere (*supra,* pp. 7, 31, 51). A State may not violate the Federal Constitution or superseding federal statutes by *action* or statute. State "policy may be expressed either formally by legislation or by implied permission" (*United States* v. *Frankfort Distilleries, supra,* 324 U. S. at p. 301), and surely by uniform, consistent conditions in purchasing contracts by the State.

Certainly the distillers may not violate the Sherman or Robinson-Patman Acts by contract. These Acts indeed are directed against collusive *contracts* and discriminatory business *contracts*. As the Court of Appeals said:

> "It is a strained argument to make, as plaintiffs do here that compliance with the compulsion of a public statute which seeks to keep down the price of liquor is the equivalent of an unlawful conspiracy to violate the Sherman Act." (16 N. Y. 2d at p. 59)

Recapitulation

We submit that we have demonstrated that appellants have not shown Section 9 to be unconstitutional; have failed completely to sustain the burden that was theirs, seeking as they do to have a legislative enactment struck down as unconstitutional, of showing that under no possible construction can it be upheld. The tenor of their argument is all through quite the opposite. What they urge is that the section be held unconstitutional if there were a possible construction or a possible hypothetical set of circumstances under which it could conceivably be unconstitutional.

All their arguments, whether of difficulty of compliance, or violation of the Federal Constitution, are spun of a great web of conjecture and speculation, of construction, which at times amounts to fantasy, of both Section 9 and the federal acts they invoke.

And when all is done, their entire position crystallizes into a tenacious stand to retain inviolate appellants' merchandising practices for their profit; primarily to retain their high prices in New York State, where 12% of the liquor business in the nation is done, and where for a variety of reasons appellants have been able to keep their prices so high.

We have shown something of the common practices of the industry which contradict appellants' contentions of difficulty of complying with Section 9.

We have shown that burden upon those whom a police power statute affects does not impeach its constitutionality.

We have shown that under the 21st Amendment, Section 9 is an enactment within the authority of the State.

We have shown that Section 9 is not a burden on interstate commerce; and that the Sherman and Robinson-Patman Acts are utterly unrelated to Section 9.

We have shown, we submit, that the challenged sections of the 1964 Liquor Law are in all respects constitutional and valid.

CONCLUSION

The decision below should be affirmed and the challenged sections of the 1964 New York State Liquor Law should be held to be in all respects constitutional and valid.

Dated: February 9, 1966.

Respectfully submitted,

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APPENDIX A

Some Similar Statutory Language in the Alcoholic Beverage Control Law Prior to § 9
(Discussed *supra* p. 33)

Re: Word "inducement".

Alcoholic Beverage Control Law §-101-b, subd. 2 (b).

"2. It shall be unlawful for any person privileged to sell liquors or wines to wholesalers or retailers * * * (b) to grant, directly or indirectly, any discount, rebate, free goods, allowance or other inducement * * *"x

Cf. § 101-c Minimum consumer resale prices subd. 6 (a)

"6. The authority is hereby authorized to promulgate rules which are necessary.

(a) to carry out the purpose of this section and to prevent its circumvention by the offering or giving of any rebate, allowance, free goods, discount or any other thing or service of value;"

§ 9 of 1964 Statute (§ 101-b, subd. 3[i])

"In determining the lowest price * * * reductions shall be made to reflect * * * all rebates, free goods, allowances and other inducements of any kind whatsoever * * *"

Re: Words "brand owner" or "owner of brand"

Alcoholic Beverage Control Law § 101-b, subds. 3 (a)xx (c)

"3. (a) No brand of liquor or wine shall be sold within the state to a wholesaler or retailer unless a schedule, as provided by this section, is filed with the liquor authority, and is then in effect.

* * *

(c) The schedule containing the bottle and case price to wholesalers shall be filed by (1) the owner of such brand, or (2) a wholesaler selling such brand and who is designated as agent for the purpose of filing such schedule if the owner of the brand is not licensed by the authority, * * *"

§ 9 of 1964 Statute (§ 101-b, subd. 3[d])

"(d) There shall be filed * * * an affirmation duly verified by the owner of such brand of liquor, or by the wholesaler designated as agent for the purpose of filing such schedule if the owner of the brand of liquor is not licensed by the authority, * * *" Similarly (f) of subdivision 3.

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x Amended 1964 by adding after word "inducement" the words *of any kind whatsoever.*

xx Continued with amendments in 1964 statute.

Appendix A

§ 101-c, subd. 3 (a)

"3. (a) Such schedule shall be filed by (1) the manufacturer or wholesaler who owns such brand if licensed by the authority, or (2) a wholesaler selling such brand, who is appointed as exclusive agent, in writing, by the brand owner for the purpose of filing such schedule, if the brand owner is not licensed by the authority, * * *"

Re: Factors in "related person" definition, item 1xxx

§ 101, subd. 1 a, b, c

Manufacturers and wholesalers not to be interested in retail places.

1. It shall be unlawful for a manufacturer or wholesaler licensed under this chapter to

(a) Be interested directly or indirectly in any premises where any alcholic beverage is sold at retail; or in any business devoted wholly or partially to the sale of any alcoholic beverage at retail by stock ownership, interlocking directors, mortgage or lien on any personal or real property, or by any other means.

(b) Make, or cause to be made, any loan to any person engaged in the manufacture or sale of any alcoholic beverage at wholesale or retail.

(c) Make any gift or render any service of any kind whatsoever, directly or indirectly, to any person licensed under this chapter which in the judgment of the liquor authority may tend to influence such licensee to purchase the product of such manufacturer or wholesaler.

Re: Factors in "related person" definition (cont.)

§ 105, subds. 16, 17.

"16. No retail licensee to sell liquors and/or wines for off-premises con-

§ 9 of 1964 Statute (§ 101-b, subd. 3[d])

"* * * As used in this paragraph (d), the term "related person" shall mean any person (1) in the business of which such brand owner or wholesaler designated as agent has an interest, direct or indirect, by stock or other security ownership, as lender or lienor, or by interlocking directors or officers, or (2) the exclusive, principal or substantial business of which is the sale of a brand or brands of liquor purchased from such brand owner or wholesaler designated as agent, or (3) which has an exclusive franchise or contract to sell such brand or brands." Similarly (f) of subdivision 3.

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xxx Item 2 of the definition which plaintiffs contend would give them trouble in compliance is discussed in the next topic of this brief. Plaintiffs raise no question as to Item 3 of the definition.

sumption shall be interested, directly or indirectly, in any premises where liquors, wines or beer are manufactured or sold at wholesale or any other premises where liquor or wine is sold at retail for off-premises consumption, by stock ownership, interlocking directors, mortgage or lien on any personal or real property or by any other means. * * *

"17. No retail licensee for off-premises consumption shall make or cause to be made any loan to any person engaged in the manufacture or sale of liquors, wines or beer at wholesale. No retail licensee to sell liquors and/or wines for off-premises consumption shall make or cause to be made any loan to any person engaged in the manufacture or sale of liquors, wines or beer at wholesale or to any person engaged in the sale of liquors and/or wines at retail for off-premises consumption."

§ 106, subds. 13, 14.

"13. No retail licensee for on-premises consumption shall be interested, directly or indirectly, in any premises where liquors, wines or beer are manufactured or sold at wholesale, by stock ownership, interlocking directors, mortgage or lien on any personal or real property or by any other means. Any lien, mortgage or other interest or estate now held by said retail licensee on or in the personal or real property of such manufacturer or wholesaler, which mortgage, lien, interest or estate was acquired on or before December thirty-first, nineteen hundred thirty-two, shall not be included within the provisions of this subdivision; provided, however, the burden of establishing the time of the accrual of the interest, comprehended by this subdivision shall be upon the person who claims to be entitled to the protection and exemption afforded hereby.

"14. No retail licensee for on-premises consumption shall make or cause to be made any loan to any person engaged in the manufacture or sale of liquors, wines or beer *at wholesale*."

APPENDIX B

Text of Sections 7, 8 and 9 of Chapter 531, Laws of 1964

§ 7. Section one hundred one-b of such law, as added by chapter eight hundred ninety-nine of the laws of nineteen hundred forty-two, subdivision four thereof having been amended by chapter five hundred fifty-one of the laws of nineteen hundred forty-eight, is hereby amended to read as follows:

§ 101-b. Unlawful discriminations prohibited; filing of schedules; schedule listing fund. 1. It is the declared policy of the state that it is necessary to regulate and control the manufacture, sale, and distribution within the state of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law. In order to eliminate the undue stimulation of sales of alcoholic beverages and the practice of manufacturers and wholesalers in granting discounts, rebates, allowances, free goods, and other inducements to selected licensees, which contribute to a disorderly distribution of alcoholic beverages, and which are detrimental to the proper regulation of the liquor industry and contrary to the interests of temperance, it is hereby further declared as the policy of the state that the sale of alcoholic beverages should be subjected to certain restrictions, prohibitions and regulations. The necessity for the enactment of the provisions of this section is, therefore, declared as a matter of legislative determination.

2. It shall be unlawful for any person [privileged to sell] *who sells* liquors or wines to wholesalers or retailers

(a) to discriminate, directly or indirectly, in price, in discounts for time of payment or in discounts on quantity

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* Italicized matter new; bracketed matter deleted by Chapter 531.

of merchandise sold, between one wholesaler and another wholesaler, or between one retailer and another retailer purchasing liquor or wine bearing the same brand or trade name and like age and quality [.]*;* (b) to grant, directly or indirectly, any discount, rebate, free goods, allowance or other inducement *of any kind whatsoever,* except a discount not in excess of two per centum for quantity of liquor, a discount not in excess of five per centum for quantity of wine and a discount not in excess of one per centum for payment on or before ten days from date of shipment.

3. (a) No brand of liquor or wine shall be sold [within the state] to *or purchased by* a wholesaler, [or retailer] *irrespective of the place of sale or delivery,* unless a schedule, as provided by this section, is filed with the liquor authority, and is then in effect. [(b) The] *Such* schedule shall be in writing duly verified, and filed in the number of copies and form as required by the authority, and shall contain, with respect to each item, the exact brand or trade name, capacity of package, nature of contents, age and proof where stated on the label, *the number of bottles contained in each case,* the bottle and case price to wholesalers, the *net* bottle and case price [to retailers] *paid by the seller,* [the number of bottles contained in each case,] which prices, *in each instance,* shall be individual for each item and not in "combination" with any other item, the discounts for quantity, if any, and the discounts for time of payment, if any. *Such brand of liquor or wine shall not be sold to wholesalers except at the price and discounts then in effect unless prior written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter.* [(c) The] *Such* schedule [containing the bottle and case price to

wholesalers] shall be filed by (1) the owner of such brand, or (2) a wholesaler selling such brand and who is designated as agent for the purpose of filing such schedule if the owner of the brand is not licensed by the authority, or (3) with the approval of the authority, by a wholesaler, in the event that the owner of the brand is unable to file a schedule or designate an agent for such purpose.

(b) No brand of liquor or wine shall be sold to or purchased by a retailer unless a schedule, as provided by this section, is filed with the liquor authority, and is then in effect. Such schedule shall be in writing duly verified, and filed in the number of copies and form as required by the authority, and shall contain, with respect to each item, the exact brand or trade name, capacity of package, nature of contents, age and proof where stated on the label, the number of bottles contained in each case, the bottle and case price to retailers, the net bottle and case price paid by the seller, which prices, in each instance, shall be individual for each item and not in "combination" with any other item, the discounts for quantity, if any, and the discounts for time of payment, if any. Such brand of liquor or wine shall not be sold to retailers except at the price and discounts then in effect unless prior written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter. [(d) The] *Such* schedule [containing the bottle and case price to retailers] shall be filed by each manufacturer [and wholesaler who sells brands of liquors or wines] *selling such brand* to retailers *and by each wholesaler selling such brand to retailers.*

[(e)] *(c)* Provided however, nothing contained in this section shall require any manufacturer or wholesaler to

list in any schedule to be filed pursuant to this section any item offered for sale to a retailer under a brand which is owned exclusively by one retailer and sold at retail within the state *exclusively* by such retailer.

4. Each such schedule shall be filed on or before the tenth day of each month on a date to be fixed by the authority, and the prices and discounts therein set forth shall become effective on the first day of the calendar month following the filing thereof and shall be in effect for such calendar month. Within ten days after the filing of such schedule the authority shall make them or a composite thereof available for inspection by licensees. Within three business days after such inspection is provided for, a wholesaler may amend his filed schedule for sales to retailers in order to meet lower competing prices and discounts for liquor or wine of the same brand or trade name, and of like age and quality, filed pursuant to this section by any licensee selling such brand, provided such amended prices are not lower and discounts are not greater than those to be met. Any amended schedule so filed shall become effective on the first day of the calendar month following the filing thereof and shall be in effect for such calendar month. [No brand of liquor or wine shall be sold except at the price then in effect unless written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter.] All schedules filed shall be subject to public inspection, from the time that they are required to be made available for inspection by licensees, and shall not be considered confidential. Each manufacturer and wholesaler shall retain in his licensed premises for inspection by licensees a copy of his filed schedules as then in effect. The liquor

authority may make such rules as shall be appropriate to carry out the purpose of this section.

5. For the purpose of raising the moneys necessary to defray the expenses incurred in the administration of this section, on or before the tenth day after this act becomes a law, there shall be paid to the liquor authority by each manufacturer and wholesaler licensed under this chapter to sell to retailers liquors and/or wines, a sum equivalent to ten per centum of the annual license fee prescribed by this chapter for each such licensee. A like sum shall be paid by each person hereafter applying for any such license or by the renewal of any such license, and such sum shall accompany the application and the license fee prescribed by this chapter for such license or renewal as the case may be. In the event that any other law requires the payment of a fee by any such licensee or applicant as set forth in this section for schedule listing, then and in such event the total fee imposed by this section and such other law or laws on each such licensee shall not exceed in the aggregate a sum equivalent to ten per centum of the annual license fee prescribed by this chapter for such license.

6. The authority may revoke, cancel or suspend any license issued pursuant to this chapter, and may recover (as provided in section one hundred twelve of this chapter) the penal sum of the bond filed by a licensee, or both, for any sale or purchase in violation of any of the provisions of this section or for making a false statement in any schedule filed pursuant to this section or for failing or refusing in any manner to comply with any of the provisions of this section.

Appendix B

§ 8. In enacting section eleven of this act, it is the firm intention of the legislature (a) that fundamental principles of price competition should prevail in the manufacture, sale and distribution of liquor in this state, (b) the consumers of alcoholic beverages in this state should not be discriminated against or disadvantaged by paying unjustifiably higher prices for brands of liquor than are paid by consumers in other states, and that price discrimination and favoritism are contrary to the best interests and welfare of the people of this state, and (c) that enactment of section eleven of this act will provide a basis for eliminating such discrimination against and disadvantage of consumers in this state. In order to forestall possible monopolistic and anti-competitive practices designed to frustrate the elimination of such discrimination and disadvantage, it is hereby further declared that the sale of liquor should be subjected to certain further restrictions, prohibitions and regulations, and the necessity for the enactment of the provisions of section nine of this act is, therefore, declared as a matter of legislative determination.

§ 9. Subdivision three of section one hundred one-b of such law, as amended by section seven of this act, is hereby amended to add eight new paragraphs, to be paragraphs (d), (e), (f), (g), (h), (i), (j) and (k), to read as follows:

(d) There shall be filed in connection with and when filed shall be deemed part of the schedule filed for a brand of liquor pursuant to paragraph (a) of this subdivision an affirmation duly verified by the owner of such brand of liquor, or by the wholesaler designated as agent for the purpose of filing such schedule if the owner of the brand of liquor is not licensed by the authority, that the bottle

and case price of liquor to wholesalers set forth in such schedule is no higher than the lowest price at which such item of liquor was sold by such brand owner or such wholesaler designated as agent, or any related person, to any wholesaler anywhere in any other state of the United States or in the District of Columbia, or to any state (or state agency) which owns and operates retail liquor stores, at any time during the calendar month immediately preceding the month in which such schedule is filed. As used in this paragraph (d), the term "related person" shall mean any person (1) in the business of which such brand owner or wholesaler designated as agent has an interest, direct or indirect, by stock or other security ownership, as lender or lienor, or by interlocking directors or officers, or (2) the exclusive, principal or substantial business of which is the sale of a brand or brands of liquor purchased from such brand owner or wholesaler designated as agent, or (3) which has an exclusive franchise or contract to sell such brand or brands.

(e) There shall be filed in connection with and when filed shall be deemed part of any other schedule filed for a brand of liquor pursuant to paragraph (a) of this subdivision an affirmation duly verified by the person filing such schedule that the bottle and case price of liquor to wholesalers set forth in such schedule is no higher than the lowest price at which such item of liquor was sold by such person to any wholesaler anywhere in any other state of the United States or in the District of Columbia, or to any state (or state agency) which owns and operates retail liquor stores, at any time during the calendar month immediately preceding the month in which such schedule is filed.

(f) There shall be filed in connection with and when filed shall be deemed part of any schedule filed for a brand of liquor pursuant to paragraph (b) of this subdivision by the owner of such brand of liquor, or by the wholesaler designated as agent for the purpose of filing such schedule if the owner of the brand of liquor is not licensed by the authority, or by a related person, an affirmation duly verified by such brand owned or such wholesaler designated as agent that the bottle and case price of liquor to retailers set forth in such schedule is no higher than the lowest price at which such item of liquor was sold by such brand owner of such wholesaler designated as agent, or any related person, to any retailer anywhere in any other state of the United States or in the District of Columbia, other than to any state (or state agency) which owns and operates retail liquor stores, at any time during the calendar month immediately preceding the month in which such schedule is filed. As used in this paragraph (f), the term "related person" shall mean any person (1) in the business of which such brand owner or wholesaler designated as agent has an interest, direct or indirect, by stock or other security ownership, as lender or lienor, or by interlocking directors or officers, or (2) the exclusive, principal or substantial business of which is the sale of a brand or brands of liquor purchased from such brand owner or wholesaler designated as agent, or (3) who has an exclusive franchise or contract to sell such brand or brands.

(g) There shall be filed in connection with and when filed shall be deemed part of any other schedule filed for a brand of liquor pursuant to paragraph (b) of this subdivision an affirmation duly verified by the person filing such schedule that the bottle and case price of liquor to re-

tailers set forth in such schedule is no higher than the lowest price at which such item of liquor was sold by such person to any retailer anywhere in any other state of the United States or in the District of Columbia, other than to any state (or state agency) which owns and operates retail liquor stores, at any time during the calendar month preceding the month in which such schedule is filed.

(h) In the event an affirmation with respect to any item of liquor is not filed within the time provided by this section, any schedule for which such affirmation is required shall be deemed invalid with respect to such item of liquor, and no such item may be sold to or purchased by any wholesaler or retailer during the period covered by any such schedule.

(i) In determining the lowest price for which any item of liquor was sold in any other state or in the District of Columbia, or to any state (or state agency) which owns and operates retail liquor stores, appropriate reductions shall be made to reflect all discounts in excess of those to be in effect under such schedule, and all rebates, free goods, allowances and other inducements, of any kind whatsoever offered or given to any such wholesaler, state (or state agency) or retailer, as the case may be, purchasing such item in such other state or in the District of Columbia; provided that nothing contained in paragraphs (d), (e), (f) and (g) of this subdivision shall prevent differentials in price which make only due allowance for differences in state taxes and fees, and in the actual cost of delivery. As used in this paragraph, the term "state taxes or fees" shall mean the excise taxes imposed or the fees required by any state or the District of Columbia upon or based up-

on the gallon of liquor, and the term "gallon" shall mean one hundred twenty-eight fluid ounces.

(j) Notwithstanding and in lieu of any other penalty provided in any other provisions of this chapter, any person who makes a false statement in any affirmation made and filed pursuant to paragraph (d), (e), (f) or (g) of this subdivision shall be guilty of a misdemeanor, and upon conviction thereof shall be punishable by a fine of not more than ten thousand dollars or by imprisonment in a county jail or penitentiary for a term of not more than six months or by both such fine and imprisonment. Every affirmation made and filed pursuant to paragraph (d), (e), (f) or (g) of this subdivision shall be deemed to have been made in every county in this state in which the brand of liquor is offered for sale under the terms of said schedule. The attorney general or any district attorney may prosecute any person charged with the commission of a violation of this paragraph. In any such prosecution by the attorney general, he may appear in person or by his deputy or assistant before any court or any grand jury and exercise all the powers and perform all the duties in respect of any such proceeding which the district attorney would otherwise be authorized or required to exercise or perform, and in such prosecution the district attorney shall only exercise such powers and perform such duties as are required of him by the attorney general or his deputy or assistant so attending.

(k) Upon final judgment of conviction of any person after appeal, or in the event no appeal is taken, upon the expiration of the time during which an appeal could have been taken, the liquor authority may refuse to accept for any period of months not exceeding three calendar months any affirmation required to be filed by such person.